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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78-5795

MARSHALL C. MOORE,

Petitioner,

-vs-

JACK R. DUCKWORTH, WARDEN
OF THE INDIANA STATE PRISON,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

Whether the Petitioner has presented any sufficient reason for this Court to review the judgment of the United States Court of Appeals for the Seventh Circuit in a habeas corpus case under 28 U.S.C. §2254 in light of the ample evidentiary support for the Petitioner's state conviction for Second Degree Murder and the Petitioner's failure to exhaust his available state remedies with respect to certain issues.

STATEMENT OF THE CASE

A.

NATURE OF CASE

This case is a habeas corpus action by an Indiana prisoner pursuant to 28 U.S.C. §2254.

B.

COURSE OF THE PROCEEDINGS BELOW

The Petitioner, Marshall C. Moore, shot and killed his wife in April of 1966 and was indicted for murder in the first degree soon afterward. His retained counsel moved for a competency determination, and he was accordingly examined by two court-appointed psychiatrists. A hearing, at which it was determined that the Petitioner was not competent to be tried, was held, and he (the Petitioner) was committed to Beatty Hospital where he was held until 1970. In April of 1970 the director of Beatty Hospital reported to the state trial court that the Petitioner was competent to stand trial, and at a hearing in June of 1971, the two psychiatrists who had examined him in 1966, agreed that he was competent. The state trial court found that the Petitioner was competent to stand trial.

The Petitioner's trial was held in January of 1972. At the conclusion of the trial, the jury returned a guilty verdict (murder in the second degree), and the Petitioner was sentenced to life imprisonment.

The Petitioner appealed his conviction to the Indiana Supreme Court and was represented by court-appointed counsel during the course of that appeal. The only issues

presented to that Court were insufficiency of evidence and insanity. The Indiana Supreme Court affirmed the conviction in March of 1973. See, Moore v. State, 293 N.E.2d 28 (Ind. 1973).

In March of 1975, the Petitioner filed a Petition for a Writ of Habeas Corpus, pursuant to 28 U.S.C. §2254, in the United States District Court, Southern District of Indiana. The District Court denied a writ in May of 1977. A certificate of probable cause was issued by the District Court, and the Petitioner appealed to the United States Court of Appeals for the Seventh Circuit. The Circuit Court affirmed the decision of the District Court (See, Moore v. Duckworth, 581 F.2d 639 (7th Cir. 1978), and the Petitioner is now seeking review of that decision.

ARGUMENT

The Petitioner's state court conviction has ample evidentiary support.

The Petitioner's first claim in the habeas corpus proceedings below was, in essence, that he had been convicted even though his sanity (at the time of the act) had not been proved beyond a reasonable doubt. The Petitioner has never disputed the finding that he shot his wife. Both the District Court and Circuit Court found against the Petitioner on the merits of his sanity claim, and the Petitioner is now, apparently, challenging the standard of review that was utilized by those courts. It is clear, however, that the Circuit Court applied the correct standard and that the decision of that Court was correct.

The issue of sanity is, of course, one of fact and must be examined in the context of a habeas corpus case under applicable state law, not federal law. Leland v. Oregon 343 U.S. 790, 72 S.Ct. 1002 (1952). The Circuit Court, therefore, first reviewed the facts in the context of Indiana law, 581 F.2d at 641-642, and concluded, as follows:

> "The Indiana Supreme Court provided a full and fair hearing on this issue and found that there was sufficient evidence for the jury to find beyond a reasonable doubt that the defendant was sane. A due process issue is raised only where a state court conviction is totally devoid of evidentiary support. Vachon v. New Hampshire, 414 U.S. 478, 94 S.Ct. 664, 38 L.Ed.2d 666 (1974). The factual finding of sanity clearly has evidentiary support, and therefore we affirm the finding of the district court below that petitioner was not deprived of the benefit of due process of law."
> (581 F.2d at 642)

Thus, it is apparent that the Circuit Court recognized the nature of the question and applied the appropriate standard of review as set out in Vachon v. New Hampshire, 414 U.S. 478, 94 S.Ct. 664 (1974) and Thompson v. Louisville, 362 U.S. 199, 80 S.Ct. 624 (1960). This Court stated in Thompson v. Louisville, supra, that:

> "The ultimate question presented to us is whether the charges against petitioner were so totally devoid of evidentiary support as to render his conviction unconstitutional under the Due Process Clause of the Fourteenth Amendment. Decision of this question turns not on the sufficiency of the evidence, but on whether this conviction rests upon any evidence at all."
> (362 U.S. at 199).

The Circuit Court recognized that review by a federal court of appeals of a state court conviction is a narrow one of due process, and not the broad exercise of supervisory power that it possesses in regard to its own trial court. Donnelly v. DeChristoforo 416 U.S. 637, 94 S.Ct. 1868 (1974). Furthermore, this standard of review is consistent with 28 U.S.C. §2254(d). Under 28 U.S.C. § 2254(d), the state court's resolution of a factual issue is presumed to be correct as long as the factfinding procedure employed by the state court was adequate. Swain v. Pressley, ___ U.S. ___, 97 S.Ct. 1224, 1231 (1977). It is undisputed that the factfinding procedure that was used by the Indiana court with respect to the Petitioner was full and fair. Therefore, it is apparent that the Petitioner's claim that the Circuit Court employed an incorrect standard of review is without merit.

In addition, it should be noted that the Indiana jury was properly instructed that the State had the burden of proving the sanity of the Petitioner at the time of the criminal act beyond a reasonable doubt, since the Petitioner had raised the issue. The Indiana Supreme Court carefully examined the sanity question on appeal and found that there was sufficient evidence for the jury to find that the Petitioner was sane beyond a reasonable doubt under Indiana law. See, Moore v. State, 260 Ind. 154, 293 N.E.2d 28 (1973). Thus, it is quite clear that the Indiana courts, as well as the federal courts in the proceedings below, properly applied the appropriate standards, and the Petitioner is not entitled to a review by this Court of his claims relating to the sanity question.

The Circuit Court correctly determined that the Petitioner has failed to exhaust his available state remedies with respect to his other claims for relief.

Exhaustion of state remedies is a prerequisite to consideration of each claim sought to be presented by a state prisoner in a federal habeas corpus proceeding. 28 U.S.C. §2254(b) and (c); Pitchess v. Davis ___ U.S. __, 95 S.Ct. 1748 (1975); Picard v. Connor 404 U.S. 270, 92 S.Ct. 509 (1971). The Exhaustion doctrine is based on the principle of comity between state and federal courts. Preiser v. Rodriquez 411 U.S. 475, 93 S.Ct. 1827 (1973). This principle of comity in habeas corpus proceedings was discussed by this Court in Picard v. Connor, supra, as follows:

> "We emphasize that the federal claim must be fairly presented to the state courts. If the exhaustion doctrine is to prevent 'unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution,' Ex parte Royall, supra, 117 U.S., at 251, 6 S.Ct., at 740, it is not sufficient merely that the federal habeas applicant has been through the state courts. The rule would serve no purpose if it could be satisfied by raising one claim in the state courts and other in the federal courts. Only if the state courts have had the first opportunity to hear the claim sought to be vindicated in a federal habeas proceeding does it make sense to speak of the exhaustion of state remedies." (92 S.Ct. at 512).

It is therefore clear that a federal court in a proceeding under 28 U.S.C. §2254 should require exhaustion

of state remedies with respect to a claim if the claim has not been fairly presented to the stete courts and if an adequate state remedy is available. 28 U.S.C. §2254 (c).

Contrary to the contention of the Petitioner, the Circuit Court did not apply a standard with respect to the exhaustion requirement that conflicts with the decisions of other Circuit Courts (see citations on page 16 of the Petition) or the decisions of this Court, as noted above. The Seventh Circuit applied the "fair presentation" standard and determined that the Petitioner had not fairly presented his "memory erasure" and "speedy trial" claims to the state courts. The Circuit Court reviewed the Petitioner's assertion that he had presented these issues to the Indiana Supreme Court through a letter to then Chief Justice Arterburn (and through several pro se motions), see 581 F.2d at 642, and concluded, as follows:

> "Our review of the letter, having the benefit of being advised by the petitioner that the letter does include these issues, reveals that the references are at best oblique, and we cannot agree that the facts and theories of these claims were fairly presented to the Indiana Supreme Court or that the Court reached and passed on the merits of these claims."
> (581 F.2d at 642-643).

The Circuit Court then determined that an adequate and viable state remedy was available to the Petitioner under the Indiana Rules of Procedure for Post-Conviction Remedies, Rule P.C.R. 1. As a result, the Circuit Court affirmed the decision of the District Court requiring exhaustion of the "memory erasure" and "speedy trial" issues. Since the Circuit Court applied the correct standards and in light of the record before that Court,

the Petitioner is not entitled to have this Court review the Circuit Court's decision with respect to the exhaustion of state remedies.

CONCLUSION

For these reasons, the Petition for a writ of certiorari to review the judgment and order of the Seventh Circuit should be denied.

Respectfully submitted,

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